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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

No. 71-1040

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT COMPANY

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR MONSANTO COMPANY AND TEXAS GULF SULPHUR COMPANY AMICI CURIAE

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APRIL 1972

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Monsanto Company and Texas Gulf Sulphur Company respectfully move for leave to file the attached brief as amici curiae.

The Federal Power Commission (FPC) states that the decision it is seeking herein will control "several cases pending in the Federal Courts," including two suits brought by Monsanto and Texas Gulf against United, and an appeal by Monsanto from an order of the Commission.[1] The FPC characterizes these as

[1] See FPC Br. 17 and n. 10.

"similar suits,"[2] when describing the action brought by Louisiana Power & Light Company (LP&L).

The suits and appeals brought by Monsanto and Texas Gulf are not similar to the action brought by Louisiana Power & Light Company. The facts and arguments of law respecting this distinction are not now before this Court. It would constitute a denial of justice for this Court to prejudge those suits and appeals on the basis of the briefs and record submitted by the Commission, United and their supporters.

Louisiana Power & Light Company's suit is essentially one for specific performance. By contrast, Monsanto and Texas Gulf have sued United in District Court for damages arising from United's failure to provide service in accordance with the impairment of service and other provisions of its contracts with these two direct customers.[3] The Commission admittedly has no jurisdiction to award damages for breach of contract.[4]

In the same suits Monsanto and Texas Gulf have also sought injunctive relief, but it is quite different from that requested by LP&L. The District Court was asked to prevent United from unlawfully enlarging its sales

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[2] FPC Br. n. 10.

[3] *Monsanto Co.* v. *United Gas Pipe Line Co.*, (D.D.C.) Civil Action No. 2037-71; order of dismissal on the grounds the FPC had exclusive jurisdiction appealed, *Monsanto Co.* v. *United Gas Pipe Line Co.*, No. 72-1093 (C.A.D.C.).

Texas Gulf Sulphur Company v. *United Gas Pipe Line Co.*, (D.D.C.) Civil Action No. 2253-71; order of dismissal on the grounds the FPC had exclusive jurisdiction appealed, *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, No. 72-1094 (C.A.D.C.) These appeals were argued together with the appeal described in footnote 5, *post*, on March 13, 1972.

[4] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

to some customers at the expense of curtailing other firm customers.

Further, having been advised by United in August 1971 that it would curtail gas supplies to their plants fully and totally at times during the 1971-1972 winter season, Monsanto and Texas Gulf ased the District Court to require United to deliver the *minimum* volumes needed to keep their plants from closing down, pending a determination of their rights.

Because the injury they alleged involved violations of the Natural Gas Act, Monsanto and Texas Gulf based their suits not only on breach of contract and breach of fiduciary duty, but also on Section 22 of the Natural Gas Act (15 U.S.C. § 717u) which provides a means of supplementing the Commission's enforcement of the act by private suits for damages and injunctive relief.

Monsanto is separately challenging in the Court of Appeals an order of the Commission approving a settlement as to United's curtailments during the 1970-1971 winter because the order was based on a record containing United's direct case which Monsanto had not been afforded an opportunity to cross-examine. Nor had Monsanto been allowed to complete discovery or present rebuttal evidence.[5]

The problems raised by the suits and appeals of Monsanto and Texas Gulf cannot be resolved by an argu-

[5] *Monsanto Co.* v. *Federal Power Commission*, No. 71-1306 (C.A.D.C.) Through discovery efforts effected subsequent to the Commission's order, Monsanto found that United had concealed from the Commission the fact that confidential in-house studies showed as early as June 1968 that United's gas supplies were depleted to the point where deficits could be anticipated in 1968-1969 and succeeding winters. Nonetheless, United initiated very large volumes of additional firm gas service in the fall of 1968 and in every year since then. The additional firm service could only be provided by curtailing firm service already being rendered to other customers.

Monsanto's competitive position in domestic and international markets.

Monsanto has sought to make United accountable for its actions in proceedings before the Commission,[3] through appeal from orders of the Commission,[4] and by a suit in District Court.[5]

United contracted in 1967 to provide the full natural gas requirements of Texas Gulf's Bully Camp Sulphur Mine up to 10,100 Mcf per day on a firm basis. This is a frasch process installation, located in the bayou country of Lafourche Parish, Louisiana, capable of injecting up to 3,000,000 gallons of superheated water a day into a suphur-bearing formation located more than 1200 feet below the marshes.

The Mine would not have been developed if United had not given its assurances that the gas supply was certain for the twenty year term of the contract. Operations commenced in May 1968. Yet United is currently ordering curtailments of gas deliveries so severe that, if complied with, they would force Texas Gulf to close the Mine, discharge 90 employees in an area offering few reemployment opportunities, and abandon over one million tons of sulphur forever under the ground. Texas Gulf will lose its remaining $10,000,000 investment in the Mine if operations are shut down by gas curtailments.

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[3] *United Gas Pipe Line Co.*, Docket Nos. RP71-29, RP71-120.

[4] *Monsanto Co.* v. *FPC*, No. 71-1396 (C.A.D.C.).

[5] *Monsanto Co.* v. *United Gas Pipe Line Co.* (D.D.C.) Civil Action No. 2037-71; order of dismissal on jurisdictional grounds appealed. *Monsanto Co.* v. *United Gas Pipe Line Co.*, No. 72-1093 (C.A.D.C.) The nature of the relief sought by Monsanto is described in its Motion for leave to file brief amici curiae, pages 2-3.

Texas Gulf has also sought to make United accountable for its actions, and to prevent the destruction of this part of its business [6] which produces and markets sulphur in competition with Duval Corporation, an affiliate of United.[7]

The Commission would have this Court believe that the suits and appeals brought by Monsanto and Texas Gulf are "similar" to the suit for specific performance brought by Louisiana Power & Light Co. and asserts that a decision here will control those cases. (FPC Br. 17 and n. 10) This Court should not allow United to escape its responsibilities so easily.

SUMMARY OF ARGUMENT

I. The natural gas industry is based on a wasting asset. That their natural gas supplies do become exhausted is respected not only in the character of the terms of the contracts executed by the pipeline companies but also by the provisions of the Natural Gas Act designed to regulate their activities. Long range supply-demand planning is the hallmark of this industry.

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[6] Texas Gulf sued United for damages, to enjoin United from reducing deliveries below a minimum of 1500 Mcf per day and an average day volume of 7,000 Mcf (70 percent of its firm contract) needed to keep the plant operating, and to enjoin United from unlawfully enlarging its sales at the expense of further curtailments of Texas Gulf and other firm customers. *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, (D.D.C.) Civil Action No. 2253-71; order of dismissal on the grounds the FPC had exclusive jurisdiction appealed, *Texas Gulf Sulphur Co.* v. *United Gas Pipe Line Co.*, No. 72-1094 (C.A.D.C.).

The Commission has declined to order United to provide the Mine with an average of 7,000 Mcf per day. Order issued January 28, 1972 in *United Gas Pipe Line Co.*, Docket Nos. RP71-29 and RP71-120. The matter is pending, after two days of hearings on March 27 and 28, 1972 on Texas Gulf's application for rehearing.

[7] Duval Corp., like United, is a wholly-owned subsidiary of Pennzoil United, Inc.

A. United's direct sales contracts and its FPC Gas Tariff contain a consistent order of priorities which protects domestic gas service by giving it the highest priority in times of gas shortages.

B. United's gas supply difficulties are due to its aggressive, improvident and unlawful enlargement of sales at a time when it lacked the gas reserves to support the new service without curtailing old service; and to its failure to curtail service in accordance with the impairment of deliveries provisions of its direct sales contracts and Tariff. This is not a "gas shortage" within the meaning of United's contracts and Tariff.

C. Congress respected the wasting asset nature of the industry by leaving to the pipeline company the decision whether to attach new service or to enlarge old service. But once the pipeline company initiates a firm service, the consumer which has given up its options to use other sources of fuel, may not be abandoned in favor of a better prospect without a hearing, proof and finding that abandonment under Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), is permitted by the public convenience and necessity or the available supply of material gas is depleted to the extent that the continuance of service is unwarranted.

D. Sections 1(b), 4, 5 and 16 of the Act, 15 U.S.C. §§ 717(b), 717c, 717d, and 717o, do not provide consumers with adequate safeguards against abandonment of gas service. They encourage the pipeline to rewrite its service obligations when its gas supplies are short, the very time when adherence to those obligations is most important to the consumer. United is simply seeking to use these provisions to sanction abandonment of gas service without meeting first the rigorous standards of Section 7(b) of the Act.

E. Gas pipeline companies owe a fiduciary obligation to their long-term firm customers to conserve system gas supplies to support the service initiated.

II. Private persons injured by violations of the Natural Gas Act are intended by Section 22 of that statute, 15 U.S.C. § 717u, to provide through private suits for damages and injunctions "a most effective weapon" for enforcement of the Act.

III. The Federal Power Commission litigated before the District Court the question of jurisdiction over United's "Green System" in Southern Louisiana. The Court of Appeals having found, on the basis of that record, that the Commission had no jurisdiction, its decision ought not be disturbed until an evidentary record is presented either before the Commission or in another District Court suit requiring a different conclusion.

ARGUMENT

I.

IN AN INDUSTRY IN WHICH FORWARD DEMAND-SUPPLY PLANNING IS THE UNIVERSAL PRACTICE, A REGULATED NATURAL-GAS PIPELINE COMPANY SHOULD NOT BE ALLOWED TO ESCAPE ITS GAS SUPPLY OBLIGATIONS WITHOUT COMPLYING FIRST WITH THE ABANDONMENT PROVISIONS OF SECTION 7(b) OF THE NATURAL GAS ACT.

The Commission and United assert that the Commission has exclusive jurisdiction over curtailments of interstate natural gas service under Sections 1(b), 4(b), 5(a) and 16 of the Natural Gas Act.[8] Their arguments ignore the history and character of the industry being regulated, and misapprehend the nature and purpose of the regulations imposed by Congress.

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[8] 15 U.S.C. §§ 717(b), 717c(b), 717d(a) and 717o.

Whatever powers the Commission has to reduce firm gas service are to be found in Section 7 of the Act,[9] and even those powers are not plenary.[10]

A better understanding of why this is so can be obtained from a brief review of the nature of the natural gas pipeline industry and the type of regulation carefully designed by Congress to meet the primary need of protecting consumers from exploitation at the hands of the pipeline companies.[11]

A. The Natural Gas Industry Markets A Wasting Asset.

The natural gas pipeline industry is based on a wasting asset. Every day a pipeline company is in business, it witnesses the exhaustion of a part of its gas supplies. Unless it finds replacement supplies, it eventually must cease operations altogether. Under the circumstances, service can be expanded prudently only if the pipeline company obtains not only sufficient supplies to preserve its capacity to serve existing customers, but also requires additional reserves large enough to support the new service without curtailing existing firm service.

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[9] 15 U.S.C. § 717f.

[10] The Commission has asked Congress to enlarge its jurisdiction to curtail loads and allocate gas in case of emergencies by enacting a new subsection to Section 7 giving it that authority. *FPC Annual Report, 1970*, p. 8 (1971).

[11] *Sunray* v. *Midcontinent Oil Co.* v. *FPC*, 364 U.S. 137, 147 (1960). The Commission appears to ignore the fact that direct sales customers, such as Monsanto and Texas Gulf, are consumers protected by the Natural Gas Act against exploitation at the hands of a natural gas company. Direct industrial consumers are not outlaws, to be injured with impunity. They are not inferior under the law to wholesale customers. Nor can service to them be prohibited by the Commission as a general proposition. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 23-24 (1961).

These were the essential facts of life of this industry in 1938 when the Natural Gas Act became law.[12] They are true today. The Natural Gas Act, like the curtailment provisions of the contracts between United and its wholesale and direct customers,[13] was drafted to meet the public interest needs created by this risky situation and to protect consumers being served by exhaustible gas supplies. Like the curtailment provisions of United's contracts, the provisions of the Act are quite precise and adequate to the situation now before this Court. The fact that United Gas Pipe Line Company failed in 1970, 1971 and 1972 to meet the requirements of its customers does not require a judicial rewriting of the provisions of the Natural Gas Act.

B. Congress Recognized the Depleting Nature of the Industry in Drafting the Natural Gas Act.

Congress carefully left to each pipeline company the essential decision as to what service it will add to its system. The Commission reviews each proposal involv-

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[12] During hearings on H.R. 11662, a predecessor of the bill which became the Natural Gas Act, Congressman Lea presiding, observed:

> "Mr. Lea. There is one problem that suggested itself to me this morning in the startling figures about the extent of gas production and its great development as carried on in recent years, and that is as to what would happen if this supply should be rapidly depleted with so many industries and perhaps homes depending on it." Hearing on H.R. 11662, to regulate the transportation and sale of natural gas in interstate commerce and for other purposes, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. p. 65 (1936).

[13] For ease in comparison, the curtailment provisions from the United-Monsanto contract and the similar provisions of United's FPC Gas Tariff which were in effect during the period covered by the damage suits brought against United by Monsanto and Texas Gulf are set out in Appendix B hereto.

ing its jurisdiction and decides which are required by the public convenience and necessity.[14] But it is the pipeline company which has both the initial and the ultimate responsibility for determining what market obligations its gas supply situation will support.

These obligations are spelled out in contracts.[15] The Commission can compel the pipeline company to undertake additional service under very restricted circumstances, but never when the new service would impair the pipeline's ability to provide service to existing customers.[16] Indeed, the law is so chary of impelling pipeline companies into improvident service commitments that even the certificates of public convenience and necessity for new service issued upon application of the pipeline company are *permissive*, leaving to the final discretion of the pipeline company whether the authorized facilities will actually be installed and the authorized service actually initiated.[17] These features of the regulatory picture serve to protect the firm service of consumers from erosion, permitting sensible planning of investments and the avoidance of unnecessary industrial dislocation.

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[14] "The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1, 17 (1961). (footnote omitted.)

[15] The relations between pipelines and their customers are based on individualized contracts. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956).

[16] Section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a).

[17] See *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F.Supp. 27, 31 (E.D. Mich. 1948), *aff'd* 173 F.2d 784 (6th Cir. 1949); Davis, K. C., *Administrative Law Treatise* § 4.10, p. 269 (1958).

Once service is initated under Commission authorization, another safeguard for the customer becomes operative which prevents a pipeline company from dropping a customer no longer economically attractive. Service cannot be abandoned except upon application, due hearing and a finding that the public convenience and necessity permits it or gas supplies are so depleted that the continuation of service is unwarranted.[18] A partial reduction in service is as much an abandonment of service as a complete cut off of service.[19]

Congress decided to treat direct sales differently from wholesales in one important respect. Under Section 1(b) of the Act,[20] the Commission was denied any jurisdiction over the rates for direct sales. The reason was clear. Such sales are made under highly competitive conditions.[21] The pipeline company needs a maximum of flexibility in negotiating contract terms, as it might be competing with another supplier of natural gas or with a supplier of oil, coal or other form of energy, in negotiating with an industry. The industrial customer, on the other hand, must be certain that the pipeline company can and will live up to the bargain thus made, before it abandons its options to use alter-

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[18] Section 7(b) of the Act. 15 U.S.C. § 717f(b). This is the only provision in the Act which refers to the depletion of gas supplies. For an example of the careful analysis and detailed evidence required in an abandonment case, see *Cabot Gas Corporation*, 3 F.P.C. 75 (1942).

[19] A "reduction in the quantity of gas delivered or the installation of controls to permit such reduction is, if not an abandonment of a portion of the Pipe Line's facilities, certainly an abandonment of *any service* rendered by means of such facilities * * *." *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

[20] 15 U.S.C. § 717b.

[21] See Hearing on H.R. 11662, *supra* n. 12, at p. 17.

native energy sources and makes substantial investments in gas using facilities.

It is certainly reasonable to expect that the pipeline company will only commit itself to provide a direct customer with the kind of service the pipeline company can reasonably expect to provide over the life of the contract, and that the industry will seek the service it needs. As the contracts between United and Monsanto and Texas Gulf make clear, the parties negotiated *firm* service, with a reasonable curtailment provision, applicable in the event of a gas shortage, similiar to that then found in United's FPC Gas Tariff.[22]

United is quite unique in the large number of long-term firm contracts it has executed with its direct industrial customers. Indeed, United is the only one of the seven pipeline companies currently curtailing gas service which provides a large amount of such service.[23]

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[22] The curtailment provision in United's FPC Gas Tariff was essentially the same from 1954 to October 1971. See Appendix B hereto for the text.

[23] United is the only major interstate natural gas pipeline company with a large number of firm direct mainline customers among the seven pipeline companies curtailing service.

Pipeline Company	*Number of Firm Direct Mainline Customers*	*Firm Direct Mainline Sales as Percentage of Total Annual Sales*
Arkansas Louisiana Gas Co.	0	0
Natural Gas Pipeline Company	2	0.898%
Panhandle Eastern Pipe Line Co.	0	0
Texas Eastern Transmission Corp.	0	0
Transcontinental Gas Pipe Line Corp.	1	0.290%
Trunkline Gas Company	1	0.005%
United Gas Pipe Line Company	*237*	*37.445%*

Source: FPC Form No. 2 for year 1970, Gas Operating Revenues, Customers and Sales.

As the Commission has been granted jurisdiction under Section 1(b) over the transportation of gas in interstate commerce to the plant site, Sections 7(c) and 7(e) enable the Commission to determine whether the service to be provided a direct customer is required by the public convenience and necessity *in light of the terms and conditions of the negotiated sales contract.*[24] At that point the Commission is empowered to attach to the certificate authorization reasonable terms and conditions required by the public convenience and necessity. But once the certificates are issued and accepted and the service commenced, the Commission lacks continuing jurisdiction to add additional terms and conditions which would reduce the volumes of gas available to the industrial customer.[25] This does not mean that the pipeline company is without the ability to obtain Commission review of the wisdom of continuing such service. The pipeline company may seek and

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[24] The Commission has on occasion denied certificate authorization to pipelines seeking to transport gas for use by industries. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). Consequently, pipeline companies are not free to grant priorities to direct industrial customers at the expense of domestic consumers. See *Panhandle Eastern Pipe Line Co.*, 7 F.P.C. 48, 63 (1948).

[25] Section 7 of the Natural Gas Act follows in general the legislative scheme of the Motor Carrier Act of 1935 governing certificates of public convenience and necessity. However, Section 7(e) carefully omits a clause in the Motor Carrier Act which gives the Interstate Commerce Commission *continuing* jurisdiction over motor carriers. The deleted text is italicized in the following quotation from 49 U.S.C. § 308(a): "* * * and there shall, at the time of issuance *and from time to time thereafter,* be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may require * * *." See Statement of FPC Commissioner Manly, Hearings on H.R. 5249 (the source of the present provisions of Section 7(e)), House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., p. 20 (1941).

obtain authorization, *prospectively*, to abandon service under Section 7(b) of the Act.[26]

C. Sections 4(b), 5(a) and 16 of the Act Do Not Provide the Committee with Authority to Curtail Gas Service.

Section 4(b) relating to unduly preferential and discriminatory service is not a grant of power; it is a prohibition.[27] One must look to Section 5(a), as the Commission does, for the source of its powers to enforce the prohibition.[28]

In *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945), this Court held that the Commission's jurisdiction under Section 5(a) applies to contracts covering direct industrial sales. That case was concerned with an appeal from a Commission order setting rates for the jurisdictional sales of a pipeline company. In finding that it was not error for the

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[26] The abandonment provisions of the Act include both transportation and sale, as this Court has found in *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 91 (1966):

> "United was found 'able and willing . . . to perform the *service* . . .' for which it had volunteered. A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform * * * without a § 7(b) finding by the Commission 'that the present or future public convenience and necessity permit such abandonment.' This is precisely what the Act forbids." (footnote omitted)

[27] A similar distinction was made by this Court when referring to Section 4(d). *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956).

[28] Section 4(e) provides that when a change is initiated by a filing by the pipeline company, the Commission is empowered to "make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." Section 5(a) applies to proceedings initiated after a rate has become effective. It operates prospectively only.

Commission, in the exceptional circumstances of that case, to allocate to the interstate wholesale business all of the earnings from the entire business (including interruptible direct sales) in excess of 6½ percent return, this Court made it quite clear that it was not thereby recognizing that the Commission had any jurisdiction over the rates charged the direct customers in view of the prohibitions of Section 1(b). "Sec. 5(a) does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business."[29]

Section 5(a) deliberately excludes "service" from the recital of the matters to which it relates. It refers only to "rate, charge or classification," and to "any rule, regulations, practice, or contract." Further support for the conclusion that Section 5(a) cannot serve as a proper vehicle for curtailing service to a direct customer is to be found in the fact that Congress excluded direct customers from the list of those entitled to bring about a hearing on complaint.[30]

When the Commission attempted to require a pipeline company to eliminate an undue discrimination prohibited by Section 4(b) by enlarging its deliveries, the Court of Appeals reversed on the ground that the action violated the proscriptions of Section 7(a) of the Act.[31]

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[29] 324 U.S. at 647.

[30] "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, state commission or gas distributing company * * *." 15 U.S.C. § 717d(a).

[31] *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F.2d 675 (3d Cir. 1953).

Section 16 of the Act is an "administrative" provision. It may serve to supplement the exercise of power under Sections 4, 5 and 7, which "provide the Commission with its primary tools for regulating the natural gas industry."[32] It cannot provide authority missing from the Act.[33] Such provisions:

> "authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."[34]

D. In an Industry in Which Long-Range Forward Supply-Demand Planning Is the Universal Practice, United Has Improvidently Violated the Trust It Owes Its Customers and Breached Its Contracts with Them.

The direct sales contracts of Monsanto and Texas Gulf contain the same order of priorities found in United's FPC Gas Tariff until November 1971 when United unilaterally changed the priorities specified in its Tariff in a minor regard.[35] The highest priority is given to domestic consumers. The second highest goes to electric generating stations to the extent they use gas to generate electricity to serve domestic consumers. All other consumers are to be curtailed pro rata.

United's Tariff and all of its direct sales contracts, so far as we are aware, utilize the expression "shortage

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[32] *City of Chicago* v. *FPC*, —— U.S. App. D.C. ——, —— F.2d —— (No. 23, 740 issued December 2, 1971), slip op. p. 21.

[33] *Willmut Gas & Oil Co.* v. *FPC*, 294 F.2d 245, 249-250 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962).

[34] *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

[35] See Appendix B, hereto. In November 1971, United placed the use of natural gas as a raw material in the second highest priority of use. This change provided raw material gas for Monsanto's plant.

of gas" in connection with curtailments of service. This provision does not cover the gas supply situation on United's system since United began to reduce deliveries to its firm customers in November 1970. United caused the gas shortage on its system by improvidently adding service when it lacked adequate gas supplies, and knew that it was short of gas. It was able to effect this by keeping the Commission ignorant of the true state of its gas supply capabilities.

United's difficulties did not arise out of a sudden and unforeseen emergency on its system caused by a national gas shortage. United, like all interstate gas pipelines, bases its operations on long-term planning. It could not be otherwise in view of the wasting nature of the asset being merchandised, the very large investments involved in constructing pipelines, and the need to gear financing, depreciation and marketing commitments to gas reserves.[36]

United had an abundance of time within which to bring its market commitments into line with its gas supplies. Its gas supply difficulties developed slowly, almost ponderously, and were forecasted in plenty of time for United to avoid dire consequences by declining to add new service. It chose instead to gamble; to use gas reserves needed to render existing firm service for the purpose of initiating new service. This may have improved United's current revenues, but at the price of accelerating the date when the gas reserves would be exhausted and unable to support the system's market obligations without curtailments.

When it came time to reveal publicly the profligacy of its policy, United ran to the Commission for help,

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[36] FPC Form No. 15, for example, requires gas supply data for a twenty-year period in the future. See 29 F.R. 4873 (1964), as amended 32 F.R. 3292 (1967), 35 F.R. 6960 (1970).

seeking to shield itself from accountability to its victimized customers behind a declaratory order of the Commission to the effect that what it had done was consistent with its direct contracts and Tariff. This merits a look at developments on United's system over the past several years.

In the 1960's United's reserve life index began to deteriorate markedly, declining from 20.78 in 1961 to 11.66 at the end of 1968.[37] During the same period its gas reserves dwindled from 26.5 trillion cubic feet (Tcf) to 17.8 Tcf. In other words, United knew for several years that its gas acquisition program was falling further and further behind its needs.

Since at least the early 1960's, United has prepared semi-annual demand-supply studies for the use of management. In the spring of 1968, these studies for the first time warned management that United was facing a gas supply deficiency which could occur on a design day during the ensuing winter (1968-1969). Similar semi-annual studies made in the fall of 1968, 1969 and 1970 confirmed that the gas supply deficiency was not being remedied, and was actually worsening rapidly. Meantime, the Federal Power Commission was being advised by United that it anticipated no gas shortage before 1974.

A comparison of what the secret studies showed with what the Commission was being told through United's

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[37] See Appendix C to this brief which contains a copy of Exhibit 6 submitted by United in the proceedings before the FPC in Docket No. RP71-29. This Exhibit and the others appended to this brief were introduced into the District Court proceedings in the *LP&L* case by FPC Counsel as Exhibits 4-6 "to show the status and scope and the extent of the proceedings before the Commission, rather than to establish the truth as to what is stated." (Joint Appendix in No. 71-2550, pp. 300-301). They constituted part of the record before the Court of Appeals.

annual reports to the Commission on FPC Form No. 15 can be seen in Appendix D hereto.[38]

United improvidently created the deficiency on its system and accelerated the depletion of its gas reserves.[39] Large additional sales to the pipeline companies, Texas Gas Transmission Corporation (100,000 Mcf per day) and Mississippi River Transmission Corporation (50,000 Mcf per day), initiated by United at high load factors in the fall of 1968, and additional service to Gulf Power Company (84,000 Mcf per day) from March through October 1969, dried up the gas available for storage during the summer of 1969.

United again enlarged its service in the fall of 1969, although it expected a major gas shortage within

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[38] Appendix D contains a copy of Exhibit 30 in the FPC proceedings which was introduced by FPC Counsel in the *LP&L* case. See n. 37, *supra*. Monsanto's attorneys discovered the secret studies, made them available to the Commission and to the public, and introduced them into evidence in the 1971 proceedings before the Commission in Dockets RP71-29, *et al.* Appendix D shows the deficits forecasted by the secret studies as early as 1968-1969 while the annual gas supply reports of United to the FPC on Form No. 15 showed no deficit before 1974. Ignorant of the misleading character of the data filed with it, the Commission authorized United in 1969 and 1970 to enlarge its service in reliance on the Form No. 15 reports.

[39] Appendix E contains a copy of Exhibit 45 in the FPC proceedings, introduced in the *LP&L* case. See n. 37, *supra*. Since the fall of 1969, when United now admits it first knew it was short of gas, United has added over 1,000,000 Mcf per day of additional firm service. Between the fall of 1968 when United's secret studies show it anticipated a gas deficit and the fall of 1969, United added another 385,000 Mcf per day of new firm service. United's admission of knowledge in 1969 of its gas shortage may be found at transcript page 117 of the FPC proceedings introduced in the *LP&L* case as part of Exhibits 7-17. See n. 37, *supra*.

ninety days.[40] In January 1970 United experienced its first actual gas supply deficiency.[41] It lasted but a few days, but the experience placed United on notice that it had reached the bottom of the barrel even during a warm winter. It also knew that its customers would hold it accountable.

Nonetheless, United continued to initiate additional service in 1970. In the summer of 1970 United's problems worsened. It could not fill its storage fields and it entered the 1970-1971 winter season with even a smaller inventory in storage than it had the prior November. Nonetheless, United did not hesitate to initiate additional service in the fall of 1970.

In November 1970, the month when it began to curtail gas service on its system on a continuous basis, United initiated the following enlarged firm service to three of its customers:[42]

Texas Gas Transmission Corporation	50,000 Mcfd
Mississippi River Transmission Corporation	51,721 Mcfd
Mid-Lousiana Gas Company	40,000 Mcfd

As it was already deficient, United could only provide this firm service by curtailing service to other firm customers including Monsanto and Texas Gulf.

Since commencing its curtailments on a continuous basis in November 1970, United has continued to en-

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[40] See Interoffice Memo dated November 11, 1969, stating that a 500,000 Mcf per day shortage was anticipated during the 1969-1970 winter, set out in Appendix F. This is a copy of Exhibit 61 in the FPC proceedings, introduced in the *LP&L* case. See n. 37, *supra*.

[41] See Appendix D hereto.

[42] See Appendix E hereto.

large service to some of its customers by curtailing firm service to its other customers. The Commission was made aware of this,[43] but has done nothing about it. The enlarged service has since been initiated, forcing a further deterioration in the firm service to Monsanto, Texas Gulf and other firm customers.

There was a time before World War II when pipeline companies dedicated specific gas reserves in specified fields to particular customers. In those days the customer could have its own geologists check on the state of the dedicated gas reserves from time to time and knew rather well the state of its energy supply situation. The customer knew that those dedicated reserves would not be syphoned off to serve another customer.

But when pipelines began to contract to sell gas from their general system reserves, the relationships changed significantly. The consumer contracting for a full-requirements firm gas supply became wholly dependent upon the good faith of the pipeline company. A trust relationship was created, one that is formed wherever one company has complete custody of gas reserves for the benefit of another.

> "Wherever the owner of an interest in oil and gas has a power with respect to another person's interest in oil and gas, the courts are quick to imply a duty in connection with the exercise of such power. Power begets

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[43] Appendix G hereto contains a copy of transcript page 4616 in the proceedings before the FPC (Docket Nos. RP71-29, RP71-120) on July 15, 1971, containing a tabulation prepared by United which shows that United intended to enlarge sales during the 1971-1972 winter by over 200,000 Mcf per day. Monsanto and Texas Gulf attempted, by their suits in District Court, to enjoin these added sales on the ground that they were unlawful under Section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a).

> responsibilities and duties. A fiduciary principle becomes applicable. The person having the power is restricted in his conduct; he is not permitted to base his conduct exclusively on self-interest. He must give consideration to the effect of his conduct upon the interest owned by another with regard to which he has a power."[44]

United violated its trust. It should be held accountable for its actions through suits brought by its injured customers.

II

PRIVATE SUITS FOR DAMAGES AND INJUNCTION CAN BE "A MOST EFFECTIVE WEAPON" FOR ENFORCING THE NATURAL GAS ACT.

United's gas shortage came as no surprise to United. Its secret studies forecast the result. United could have forestalled the shortage by refusing to attach new or enlarged service. Or, if it chose the course of adding service "by taking it away from existing lawful customers,"[45] United had both the obligation and the time to file a petition with the Commission in accordance with the abandonment provisions of section 7(b) of the Natural Gas Act.[46] It chose, instead, to injure its customers without legal sanction.

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[44] Williams, H. R., "The Fiduciary Principle in the Law of Oil and Gas." *13th Oil & Gas Inst.* 201, 274 (S.W. Legal Fdn. 1962). Professor Williams of Columbia University Law School is co-author of Williams and Myers, *Oil and Gas Law* (1959).

[45] In *Granite City Steel Co.* v. *Federal Power Commission*, 115 U.S. App. D.C. 392, 320 F.2d 711, 713 (1963), the Court of Appeals construed section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a): "The theory and purpose of the statutory restriction appear to be that persons desiring gas for the first time or desiring more gas should not get it by taking it away from existing lawful customers."

[46] 15 U.S.C. § 717f(b).

The primary purpose of the Natural Gas Act was to protect consumers from exploitation at the hands of natural-gas pipeline companies.[47] Protection of the pipeline company against suits by injured consumers arising from its violations of the Natural Gas Act, breach of trust and breach of contract would defeat this purpose as the Commission cannot grant reparations.[48]

The Commission's attempt to garner to itself total regulatory authority also ignores Section 22 of the Natural Gas Act.[49] This provision provides a supplemental means of enforcement at the behest of an injured person. The possibility of damage suits and injunctive relief represent "a most effective weapon" in the enforcement of obligations under the Act. To limit an injured consumer to the processes of a Commission which has already failed to provide the protection necessary to avoid injury is not an acceptable alternative. The "hurdles that the victim might face * * * might well prove insuperable to effective relief." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 435 (1964).

In *Borak*, a private suit relying upon a provision of the Securities Exchange Act of 1934 similar to Section 22 of the Natural Gas Act, this Court emphasized the remedial nature of the provision:

> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a fed-

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[47] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[48] *Id.* at 618.

[49] 15 U.S.C. § 717u.

eral statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) * * *."[50]

III

THE DECISION OF THE COURT OF APPEALS AS TO JURISDICTION OVER UNITED'S GREEN SYSTEM SHOULD NOT BE DISTURBED, AT LEAST NOT AT THE PRESENT TIME OR FOR THE REASONS ASSERTED BY APPELLANTS.

This part of this brief is germane only to the interests of Texas Gulf and should be considered as its submission only.

Texas Gulf's Bully Camp Sulphur Mine is served from United's Green System East which the Court of Appeals found was not subject to the Commission's jurisdiction.[51] When United contracted in 1967 to supply Bully Camp with a firm gas supply, United considered that that part of its pipeline system was not subject to the Commission's jurisdiction.

The facts concerning these facilities, their gas sources, the pattern of gas flows and the markets being served were tried before the District Court. United presented as its witness Mr. J. H. Echterhoff, vice president in charge of transmission operations. The General Counsel of the Federal Power Commission actively participated in developing the testimony of this witness through direct examination.[52]

The decision of the Court of Appeals, based on this record, provides the customers on the Green System

[50] 377 U.S. at 433.

[51] Petition of United for Writs, p. 25a.

[52] Joint Appendix in 71-2550, pp. 292-300; see also testimony of Mr. Cassin, pp. 283-285.

with the stability of gas service they contracted for and which United promised to render. The Court has given that service the same sort of protection that jurisdictional service enjoys under Section 7(b) of the Natural Gas Act.[53] Under the circumstances, United must take the initiative and justify any degradation of the service not permitted by its contract.

United's motive in seeking Commission assertion of jurisdiction is transparent. It wishes to have this government agency break the firm contracts United executed so very recently, and to present its customers with the ultimatum of paying unregulated prices substantially higher than the contracts provide, or be cut off the line regardless of consequent injury to their plants.[54]

The Commission has accepted United's challenge. In Opinion No. 610, issued February 9, 1972,[55] the Commission found that it has jurisdiction over the Green System and declined to certificate service to any of the firm customers on the system, despite the fact that many had been customers long before any event occurred that allegedly vested the Commission with jurisdiction. At a stroke of the pen, United's firm customers found themselves deprived of the stable contract rights which had induced them to invest millions of dollars in new plants. They were reduced to the status of mere permittees, able to receive gas on an emergency basis for the time being, to be cut off should further hearings

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[53] 15 U.S.C. § 717f(b).

[54] This Court rebuffed an earlier attempt by United to raise prices higher than it had contracted for. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

[55] *United Gas Pipe Line Co.*, FPC Docket No. CP 71-89; Petition of United for Writs, p. 91a.

demonstrate that the price contracted for by United is not fully compensatory.

This is not the protection of consumers from exploitation at the hands of natural gas companies contemplated by the Natural Gas Act.[56] What it amounts to is absolution from a pipeline company's responsibilities to its customers and protection of the company from its derelictions.

The service on the Green System should be "grandfathered," afforded the status interstate service received at the time the Natural Gas Act first became law,[57] if and when the Commission acquires jurisdiction. Meanwhile, Commission jurisdiction should be limited to transportation of gas in pipelines clearly carrying gas on to the interstate market.[58] The Green System East is not being used for this purpose.

CONCLUSION

In view of their pending suits and appeals, Monsanto and Texas Gulf respectfully urge that this Court take no action in these proceedings which can serve to shelter United from accountability to its customers for abuse of its fiduciary duties to preserve its gas supplies for the benefit of its firm customers, and for breach of contracts. Nor should this Court deny to lower federal courts the jurisdiction, whether under Section 22 of the Natural Gas Act or in diversity suits, to enjoin United from actions which are in violation of

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[56] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

[57] 15 U.S.C. §717f(c).

[58] See *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

law, or which involve irreparable injuries arising out of breach of trust or breach of contract.

Respectfully submitted,

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April 1972